No. 87-1809

Supreme Court, U.S.
FILED
MAY 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

LARRY A. HOFFMAN,
Petitioner,

vs.

GLIDDEN COATINGS & RESINS
DIVISION OF SCM CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Is summary judgment proper where the issue presented below and here is whether an employer has retaliated against an employee in violation of Title VII, 704(a) which employee was protecting the rights of a female whose rights were protected by Title VII of the Civil Rights Act of 1964 42 U.S.C. §2000(e), where the employer can be charged with knowledge that it is retaliating unlawfully despite the employee's lack of an exact statement to the employer accusing the employer of the unlawful discrimination?

PARTIES BELOW

Parties before the United States Court of Appeals for the Sixth Circuit were Larry A. Hoffman as Appellant and Glidden Coatings & Resins Division of SCM Corporation as Appellee.

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No. _____

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OPINIONS BELOW

No opinion was rendered by the Sixth Circuit Court of Appeals. The order of the Court of Appeals not yet reported, appears in the appendix hereto.

The opinion of the United States District Court for the Northern District of Ohio, Western Division, not yet reported, as well as the report of and recommendation of the referee, also appear in the appendix hereto.

JURISDICTIONAL STATEMENT

Petitioner, Larry A. Hoffman, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 5, 1988. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS

The full text of the following statutory provisions appears in the appendix hereto:

Title VII Section 704(a), 42 U.S.C. §2000e-3(a).

STATEMENT OF THE CASE

This is a case of retaliatory discharge in violation of Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000 *et seq*). On or about December 20, 1983, respondent, Glidden Coatings and Resins, Division of SCM Corporation discharged the petitioner, Larry Hoffman, from his employ due to his attempts to have his daughter, Lisa Hoffman, treated as an equal to men in the employer's plant.

On or about January 3, 1984, petitioner initially filed his written complaint of the retaliatory discharge with the Equal Employment Opportunity Commission (hereinafter, EEOC). On or about January 17, 1984, petitioner filed his written complaint of the retaliatory discharge with the Ohio Civil Rights Commission (hereinafter, OCRC). Thereafter, on or about March 30, 1984, the charge filed with the OCRC was withdrawn wherein the EEOC was to have full jurisdiction of the petitioner's claim of a retaliatory discharge.

On or after June 4, 1984, the EEOC notified petitioner of his right to institute this action within ninety days of the receipt of the notification. Petitioner did so institute further action in regard to this matter by filing his claim in the United States District Court for the Northern District of Ohio, Western Division on July 24, 1984.

On or about October 21, 1986, the respondent filed a Motion for Summary Judgment which was granted by Magistrate James G. Carr through his Report and Recommendation filed January 14, 1987. The Report and Recommendation of Magistrate of James G. Carr was adopted by Judge Walinski on or about February 25, 1987, over and above the objections filed by the petitioner on January 23, 1987.

From the Opinion and Order of the lower court, the petitioner did file his Appeal with the United States Court of Appeals for the Sixth Circuit, which court affirmed the decision and order of the District Court.

REASONS FOR GRANTING THE WRIT

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, Summary Judgment should not have been granted against Larry Hoffman. Larry Hoffman created a genuine issue of material fact pursuant to Federal Rule of Civil Procedure 56(C) and thus should not have had his case dismissed by Magistrate Carr by his Order dated January 14, 1987. In ruling on a Motion for Summary Judgment, "the Court must construe the evidence in its most favorable light in favor of the party opposing the Motion and against the movant." *Bohn Aluminum and Brass Corporation v. Storm King Corporation*, 303 F.2d 425, at 427 (6th Circuit 1962). Further, as is well established precedent, the non-moving party is entitled to all reasonable inferences that may be drawn in his favor. *Adickes v. S.H. Kress and Company*, 398 U.S. 144, 90 S. Ct. 1598 (1970). As such, the comments made by Larry Hoffman, to the effect he had contacted "management" concerning his belief that men were being treated preferentially to women must and can only be viewed in favor of plaintiff's contentions that management knew they were retaliating against petitioner in violation of 42 U.S.C. §2000e-3(a).

The petitioner is relying upon well settled law concerning summary judgment. Judge Walinski in the District Court relied on the case of *Bouldis v. U.S. Suzuki Motor Corporation*, 711 F.2d 1319, 1324 (6th Cir. 1983). As *Bouldis* states, it is well established that Larry Hoffman, the petitioner, should have had the facts viewed in a light most favorable to him. In determining whether summary judgment should be granted or not, *Watkins v. Northern Ohio Pulers Association, Inc.*, 673 F.2d 1155, at 1158 (6th Cir. 1980), stated "the movants papers are to be closely scrutinized while those of the

opponent are to be viewed indulgently." It is quite clear from this quote of the *Watkins* case that summary judgment in no way should have been granted to the respondent.

Of import here is that there is a question of fact which the trier of fact must determine. That is, whether management was or was not aware of Larry Hoffman's thoughts and beliefs that his daughter, Lisa, a female, was not being treated on an equal footing with men. The law makes it unlawful for an employer to retaliate against one who is protecting the rights of a female, which female the employee believes is being discriminated against. Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e-z). The law also indicates that the thoughts of discrimination must be communicated to the employer, and the employee must be engaged in protected activity. *Holcolm v. Owens-Illinois, Inc.*, 793 F.2d 745 (6th Cir. 1986). There was sufficient evidence presented of both the activity of attempting to see that a female, albeit his daughter, is treated equally with men and his communication of this to management, to produce a question for the trier of fact.

Further, it strongly contended that management's knowledge of claimed illegal activities is a question for the trier of fact. Title VII Section 704(a), as set out in the Appendix does not state that an employee must expressly tell his employer that the employer is practicing discrimination as has been the respondent's interpretation. The "opposition clause" as it is called discusses an employee's opposition to an employer's practice. It does not state that the employee must specifically tell the employer that the employer's actions are unlawful. To interpret *Holcolm* and Title VII Section 704(a) to mean that an employee must tell his employer

that employer is discriminating would be a statement by this Court allowing employers to (1) discriminate and (2) discharge someone in retaliation. The purpose of the statute and this Court, as well as all the courts of this country, is to protect people against discrimination. The respondent wants this Court to rule against the petitioner on a technicality that he was not and could not be aware of to protect his job. Title VII Section 704(a) must be read to allow petitioner to be protected from retaliation of the respondent when they were well aware of why he was complaining of their practices but didn't come out and directly say to them "you are discriminating against my daughter because she's a female." This Court must allow certiorari and hear this case fully to protect the rights given under 1964 Civil Rights Act.

Respectfully submitted,

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APPENDIX

MAGISTRATE'S REPORT AND RECOMMENDATION IN THE UNITED STATES DISTRICT COURT

(Dated January 14, 1987)

C 84-7624

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LARRY HOFFMAN,
Plaintiff,

v.

GLIDDEN COATINGS AND RESINS,
DIV'N OF SCM CORPORATION,
Defendant.

MAGISTRATE'S REPORT AND RECOMMENDATION

This is an employment discrimination case in which the parties have consented to entry of judgment by the undersigned. Pending is a motion by the defendant for summary judgment, which is decisional. Upon a review of the motion, the plaintiff's response and the defendant's reply, and the exhibits attached thereto, I conclude, for the reasons which follow, that the plaintiff has failed to established a prima facie case. The defendant's motion shall, therefore, be granted.

The gravamen of the plaintiff's lawsuit is that he was fired because he was active on behalf of his daughter's efforts to secure and maintain full-time employment with the defendant. Those efforts, according to him, were frustrated because the company discriminated against the daughter on the unlawful basis of her gender. This led him, according to his complaint and deposition, to seek redress on her behalf to remedy the ill effects of the company's unlawful discriminatory practices. That activity, he claims, in turn caused the company to fire him in retaliation for asserting his daughter's rights under Title VII.

All pertinent matters regarding the defendant's motion for summary judgment are not in dispute. The plaintiff was fired, and to some extent, his efforts on behalf of his daughter was factor which motivated the decision to terminate him (along with other factors, according to the company). But it is also undisputed that the plaintiff never told the company that his efforts to secure and maintain employment for his daughter were motivated by his belief that the company's decision were based on the fact that the daughter was female. At most, he "thought" that such was the case. But he never stated so, even indirectly or obliquely. Nor is there any other indication in the record that he said or did anything which could reasonably be perceived as having been likely to call the company's attention to his concerns about the allegedly discriminatory treatment being meted out upon his child. Even if such were the case (and an earlier decision of this Court has resolved that issue against the daughter, and, implicitly, the plaintiff here), no claim for retaliation can be based upon a position which was never communicated or otherwise made known to the company.

Most simply put, one cannot retaliate against that of which he is unaware. Absent such awareness, there can be no animus, and without animus, there cannot be any unlawful response. Thus, the better view, and the one which appears to have been adopted generally, and which I adopt expressly, is that, a showing that "the employer was aware of his employee's protected activities . . . lays the crucial groundwork for the plaintiff's ultimate burden of showing by a preponderance of the evidence a causal connection between the employer's action and [his] own: obviously, an employer cannot be motivated by something he has never heard of, and the cases have indeed so held." 3 Larson, Employment Discrimination 17-116, -119 (1986) (footnotes omitted).

A4

OPINION AND ORDER OF THE DISTRICT COURT

(Dated February 25, 1987)

No. C 84-7624

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

LARRY HOFFMAN,
Plaintiff,

vs.

GLIDDEN COATINGS & RESINS,
Defendant.

OPINION AND ORDER

This cause came to be heard on plaintiff's objections to the Report and Recommendation of the United States Magistrate. In accordance with *Hill v. Duriron*, 656 F.2d 1208 (6th Cir. 1981), and 28 U.S.C. §636 (b)(1)(B) and (C), this Court made a *de novo* determination of the Magistrate's findings to which the plaintiff objects. For the following reasons, plaintiff's objections are not well taken and the same are denied.

This is a retaliatory discharge action brought by Larry A. Holmes against Glidden Coatings & Resins pursuant to Title VII, 42 U.S.C. §2000e-3(a). Plaintiff alleges he was discharged in retaliation for objecting to defendant's alleged discriminatory discharge of his daughter. With regard to his daughter's discharge, this Court found no merit in her claim. *Lisa Hoffman v.*

Glidden Coatings & Resins, No. 84-7623 (N.D. Ohio July 10, 1986), *appeal docketed*, No. 86-3738 (6th Cir. Aug 11, 1986). In the case at bar, the Magistrate found that plaintiff failed to establish a prima facie case of retaliatory discharge and recommended defendant's motion for summary judgment be granted. Plaintiff objects to the Magistrate's Report and Recommendation.

The Magistrate found that plaintiff failed to convey to defendant his belief that the defendant had discriminated against his daughter, either directly or indirectly. Furthermore, the Magistrate determined that plaintiff failed to produce any evidence that could reasonably be perceived as having drawn defendant's attention to his belief. Since no claim for retaliation can be based upon a position which was never known to defendant, the Magistrate concluded that plaintiff failed to establish a prima facie case.

Plaintiff's sole objection is that the Magistrate misinterpreted plaintiff's Exhibit (C). Exhibit (C) is an excerpt from plaintiff's deposition in which he gave the following response; "No, but I thought she ought to have a fair opportunity to work same as men they're putting into filling." (Plaintiff's Depo. at 99). Plaintiff was next asked "Who did you talk to?" to which he answered, "Management." Plaintiff contends this indicates he had spoken to management regarding its alleged discrimination of a female.

It is well settled in considering a motion for summary judgment, facts are to be viewed in the light most favorable to the non-moving party. *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). However, this Court is not compelled to view evidence out of context. The response on which plaintiff so heavily relies was given during a line of questioning concerning a

particular discussion with defendant's plant supervisor. After describing his attempt to prevent his daughter's layoff, plaintiff was asked, in relevant part, "why did you inject yourself into that?" (Plaintiff's Depo. at 98). It was in response to this question that plaintiff stated, "I thought she ought to have a fair opportunity to work same as men . . . ." Taken in the context of this line of questioning, the response clearly describes plaintiff's state of mind rather than a communication to defendant.

Upon further review of the record, this Court finds no evidence that plaintiff communicated his belief to defendant. Nor is there evidence which could reasonably be perceived as having drawn defendant's attention to this belief. The Magistrate's findings are consequently adopted by this Court.

It is therefore,

ORDERED that the plaintiff's objections to the Magistrate's Report and Recommendation of January 14, 1987 are found to be not well taken and the same are denied.

FURTHER ORDERED that the Magistrate's Report and Recommendation is adopted as the order of this Court.

FURTHER ORDERED that defendant's motion for summary judgment is granted.

FURTHER ORDERED that this case is dismissed.

NICHOLAS J. WALINSKI
SENIOR U. S. DISTRICT JUDGE

Toledo, Ohio
February 25, 1987

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Dated February 5, 1988)

No. 87-3262

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LARRY A. HOFFMAN,
Plaintiff-Appellant,

vs.

GLIDDEN COATINGS & RESINS,
DIVISION SCM CORPORATION,
Defendant-Appellee.

ORDER

BEFORE: LIVELY, *Chief Judge;* JONES and BOGGS, *Circuit Judges.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

IT IS ORDERED that the judgment of the District Court be, and it hereby is, AFFIRMED upon the opinion of the District Court.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN, CLERK
/s/ JOHN P. HEHMAN

TITLE VII SECTION 704(a)

42 U.S.C. §2000e-3(a)

§2000e-3. Other unlawful employment practices

(a) Discrimination on account of opposition to unlawful practices or participation in investigation, proceeding, or hearing. It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title [42 USCS §§2000e-2000e-17], or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title [42 USCS §§2000e-2000e-17].

SUPREME COURT, U.S.
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October Term, 1987

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vs.

GLIDDEN COATINGS & RESINS,
DIVISION OF SCM CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT GLIDDEN COATINGS & RESINS, DIVISION OF SCM CORPORATION IN OPPOSITION

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I.

QUESTION PRESENTED FOR REVIEW

Petitioner has identified the following as the question presented for review:

> Is summary judgment proper where the issue presented below and here is whether an employer has retaliated against an employee in violation of Title VII, 704(a) which employee was protecting the rights of a female whose rights were protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e), where the employer can be charged with knowledge that it is retaliating unlawfully despite the employee's lack of an exact statement to the employer accusing the employer of the unlawful discrimination?

II.

RULE 28.1 STATEMENT

Respondent Glidden Coatings & Resins, Division of SCM Corporation is a wholly owned subsidiary of Imperial Chemicals Industries, PLC.

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ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT GLIDDEN COATINGS & RESINS, DIVISION OF SCM CORPORATION IN OPPOSITION

Respondent Glidden Coatings & Resins, Division of SCM Corporation respectfully requests that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF FACTS

Petitioner Larry A. Hoffman ("Hoffman") was hired as a paint maker by respondent Glidden Coatings & Resins, Division of SCM Corporation ("Glidden") in 1973. In 1982, Hoffman was promoted to a supervisory position and began a campaign to secure full-time employment for his daughter with Glidden.

As part of this campaign, Hoffman repeatedly hounded management at all levels with inquiries about the possibility of getting his daughter a full-time position. These efforts continued even after the Company explained its anti-nepotism practice to him, and even after he was directly ordered to stop pursuing the matter.

In the meantime, Glidden received complaints from those working under Hoffman that he gave conflicting orders, started arguments, and did not understand the technical aspects of his job. After tolerating a year of Hoffman's harassment on behalf of his daughter and his refusal to concentrate on his performance despite repeated counseling, the Company terminated Hoffman's employment on December 20, 1983.

Following his termination, Hoffman contended that his attempts to obtain a position for his daughter were motivated by a desire to oppose sex discrimination. There was no evidence, however, that he had ever communicated that belief to management. At his deposition, Hoffman testified that while he "thought" his daughter was being treated unfairly, he told management only that he wanted her to be hired for a full-time position. Absent evidence that Glidden was ever aware of Hoffman's alleged intentions, the only

conclusion possible was that Hoffman was terminated because of his substandard performance and the undue pressure he applied to management to secure a job for his daughter.

The United States Magistrate recommended that summary judgment be entered in Glidden's favor since Hoffman had never communicated his thoughts to management. The District Court, after *de novo* review of the Magistrate's decision, granted summary judgment, agreeing that Hoffman's thoughts described only his state of mind. The Sixth Circuit affirmed the granting of summary judgment without opinion.

REASONS WHY THE PETITION SHOULD BE DENIED

I. SUMMARY JUDGMENT WAS PROPERLY GRANTED IN GLIDDEN'S FAVOR SINCE IT WAS NOT AWARE OF HOFFMAN'S ALLEGED MOTIVE TO OPPOSE SEX DISCRIMINATION.

A. An Employer Cannot Be Held Liable For Retaliation If It Is Not Aware That The Employee Was Engaged In Protected Activity.

Section 704(a) of Title VII, 42 U.S.C. §2000e-3(a), the so-called "opposition clause", prohibits an employer from retaliating against an employee for opposing a violation of Title VII. *Holden v. Owens-Illinois, Inc.*, 793 F.2d 745, 748 (6th Cir. 1986). Courts have uniformly held that an employee who fails to demonstrate causation between "protected conduct" and termination cannot establish a prima facie case of retaliation under the opposition clause. *See, e.g., Holden v. Owens-Illinois,* 793 F.2d 745 (6th Cir.) (employee had not opposed conduct constituting a violation of Title VII), *cert. denied,* _____ U.S. _____, 107 S. Ct. 649 (1986); *Cooper v. City of North Olmsted,* 795 F.2d 1265 (6th Cir. 1986) (stating element of causation).

The courts have also uniformly determined that an employer cannot be held liable for retaliation if it is unaware that the employee is engaged in protected activity. *E.g., Choen v. Fred Meyer, Inc.*, 686 F.2d 793, 797 (9th Cir. 1982) (employer could not have retaliated against the plaintiff because it made the alleged retaliatory decision before it became aware that she had filed a charge of discrimination); *Gunther v. County of Washington,* 623 F.2d 1303, 1316 (9th Cir. 1979), *aff'd,* 452 U.S. 161 (1981) (employee failed to establish a prima facie case of

retaliation since the employer was unaware of her protected activities at the time of the adverse employment decision); *Weems v. Ball Metal & Chemical Division, Inc.*, 753 F.2d 527, 528 (6th Cir. 1985) (retaliation claim properly dismissed since the employer was unaware that the employee had provided statements to the Equal Employment Opportunity Commission prior to her termination).

B. Glidden Could Not Have Retaliated Against Hoffman Since It Was Unaware That His Efforts On Behalf Of His Daughter Were Allegedly Directed Towards Preventing Discrimination.

Glidden could not have retaliated against Hoffman since it was never aware that he allegedly was seeking to redress discrimination. Hoffman was questioned extensively during his deposition on the exact nature of all his conversations with management. Despite this detailed inquiry, Hoffman could identify *no* instance in which he communicated to any company official his belief that discrimination existed. At best he testified only that he harbored a belief that his daughter was being treated unfairly.

In contrast, Glidden presented competent testimony by affidavit that it was unaware of Hoffman's alleged motive. Hoffman produced no evidence by affidavit, deposition testimony, or otherwise, that Glidden was ever aware of the motives which he concealed. *See* Rule 56(e). Absent such evidence, it was undisputed that Glidden could not have retaliated against Hoffman because it was unaware that he was engaged in protected conduct.

C. Hoffman's Thoughts Created No Question Of Fact As To Glidden's Knowledge.

Glidden does not dispute that, in ruling on a motion for summary judgment, the court must view the evidence in a light most favorable to the nonmoving party, and must give the nonmoving party the benefit of all reasonable inferences. *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1324 (6th Cir. 1983). However, a mere possibility of the existence of a factual dispute, or a "hint" that a question of fact may exist is *insufficient* to justify the denial of a summary judgment motion. *E.g., Posey v. Skyline Corp.*, 702 F.2d 102, 106 (7th Cir.), *cert. denied*, 464 U.S. 960 (1983). There is no requirement that statements be viewed out of context, or that they be distorted to give rise to unnatural inferences not supported by the record.

As stated by this Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), "the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." In this case, after ample time for discovery, Glidden moved for summary judgment on the basis that Hoffman had never communicated his alleged motive. Hoffman's failure to present any evidence that his thoughts were ever communicated to management dictated that summary judgment be granted in Glidden's favor.

II. THIS CASE DOES NOT MERIT SUPREME COURT REVIEW.

Rule 17 of the Rules of the Supreme Court of the United States provides that review on writ of certiorari "will be granted only when there are special and important reasons therefor." No such special and important reasons exist in this case.

As Hoffman states throughout his Petition, this unremarkable case concerns only a single question of fact: whether Glidden was aware of his alleged intention to oppose discrimination (Petition at §I and pp. 4-6). Hoffman contends that his thoughts were sufficient to create a genuine issue of material fact as to Glidden's awareness of his motives, while the Courts below did not.

The Sixth Circuit's unanimous ruling was fully consistent with its prior authority. It was also consistent with authority from other circuits and the decisions of this Court. Although Hoffman differs with entry of summary judgment against him, he can point to no conflict between the circuits or any directly contrary authority.

Hoffman's claim is not of national importance. There are, to Glidden's knowledge, no similar cases pending in any court. The ruling below was not even of sufficient importance for any of the lower decisions to be officially published. The Sixth Circuit wrote no opinion at all and, in fact, ruled from the bench during oral argument that Hoffman's claim had no merit. The case simply involved the straightforward application of well established principles to a garden-variety suit in which the plaintiff had no evidence to support his baseless allegations of retaliation.

CONCLUSION

This case does not merit Supreme Court review. The United States Magistrate, District Court, and Sixth Circuit all properly held that Hoffman's mere unarticulated intent to oppose sex discrimination did not create a genuine issue of material fact as to Glidden's knowledge of his reasons. The case presents no conflict between or among the circuits, no conflict with the decisions of this Court, and no issue of such importance as to warrant this Court's intervention.

For all of these reasons, Hoffman's Petition should be denied.

Respectfully submitted,

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